

LONDON BOROUGH OF CAMDEN	WARD: All
REPORT TITLE: BHP Class Action	
REPORT OF: Executive Director Corporate Services	
FOR SUBMISSION TO: Pension Committee	DATE: 4 December 2023
SUMMARY OF REPORT: This report presents issues surrounding Australian based miner, BHP, which the Fund owned in its equity portfolio. BHP is one of the world's top producers of major commodities including iron ore. In November 2015 a dam operated by a Brazilian iron ore company, Samarco Mineracao, a joint venture part-owned by BHP, collapsed releasing a deluge of toxic waste which killed 19 people and has had a catastrophic impact on the surrounding communities and environment. The report considers joining a class action against BHP led by Grant & Eisenhofer.	
Local Government Act 1972 – Access to Information No documents requiring to be listed were used in the preparation of this report: Contact Officer: Nigel Mascarenhas Head of Treasury and Financial Services Finance Corporate Services Dennis Geffen Annexe Camley Street London. N1C 4DG Telephone 0207 974 1904 Email nigel.mascarenhas@camden.gov.uk	
RECOMMENDATIONS: The Committee is asked to: 1. Subject to recommendation 2, agree that the Fund join the class action led by G&E KTMC Funding, LLC (G&E Law); 2. Delegate authority to the Executive Director of Corporate Services in consultation with the Borough Solicitor to take all decisions relating to this action and the conduct of the litigation to include entering into any documentation required for the purposes of the litigation and any decisions as regards settlement.	
Signed by Director of Finance Agreed Date 22/11/2023	

1. Introduction

- 1.1. BHP is an Australia-based multinational company that serves as one of the world's largest diversified mining and mineral resources company. On 5 November 2015, the Fundão Dam at the Germano iron ore mine in Brazil (co-owned by BHP) collapsed, causing a toxic mudslide that swept away the village of Bento Rodrigues, killing 19 people, and causing permanent environmental damage.
- 1.2. The news of this calamity, which has been described as the worst environmental disaster in Brazil's history, immediately caused BHP's stock price to drop, and it continued to fall as additional news about the ever-worsening financial impact of the collapse continued to be announced. By 24 February 2016 the stock had fallen by more than 30%.
- 1.3. It appears that BHP knew or should have known that there was a significant risk the dam would collapse as early as August 2012. Despite that knowledge, BHP failed to "immediately disclose" this risk to investors, as is required under Australian law. Accordingly, claims for the recovery of damages are brought on behalf of investors that acquired BHP Ltd. and/or BHP Plc shares from 8 August 2012 through to 9 November 2015 (inclusive), which cover losses suffered by those shareholders up to and including 30 November 2015.
- 1.4. Vince Impiombato and Klemweb Nominees Pty Ltd, as trustee for the Klemweb Superannuation Fund, are bringing a legal action against Australia-based BHP Group Limited formerly BHP Billiton Limited in the Federal Court of Australia for the District of Victoria. Grant and Eisenhofer (G&E) and Kessler Topaz Meltzer & Check (KTMC) are Funding the litigation.
- 1.5. The Pension Fund is a Responsible Investor and has developed its Investment Beliefs which underpin everything it does. Many of the investment beliefs which are developed from the United Nations Sustainable Development Goals are relevant to this issue:
 - Life below water
 - Life on land
 - Sustainable cities and communities
 - Responsible consumption and production
 - Clean water and sanitation
 - Reduced inequalities
- 1.6. The Fund works very closely with the Local Authority Pension Fund Forum (LAPFF) and they have written many [reports](#) on the tailings dam tragedies including this fatal incident.
- 1.7. LAPFF has engaged extensively with BHP in relation to the Samarco tailings dam collapse since the dam collapsed on 5 November, 2015.
- 1.8. In particular, LAPFF has been concerned that the company is not taking adequate accountability and responsibility for its role in the collapse, in line with its stated commitment to the UN Guiding Principles on Business and Human Rights.

- 1.9. BHP repeatedly points to Samarco as the operating partner of the collapsed dam and the Renova Foundation as the entity established by BHP, Vale (the other joint venture owner), and the Brazilian authorities to carry out compensation, reparations, and resettlement for the victims of the dam collapse.
- 1.10. However, LAPFF's view has been that the company has not accepted an appropriate level of accountability for the collapse or the subsequent reparations.
- 1.11. LAPFF has been so concerned about BHP's and Vale's responses to the dam collapse that its chair, Cllr Doug McMurdo travelled to Brazil to visit the communities affected by the dam collapse and to see for himself the community concerns about the reparations still taking place over eight years after the collapse.
- 1.12. Cllr McMurdo requested meetings with both BHP and Vale during his visit to Brazil. While the Vale Chair spent two days with Cllr McMurdo, BHP refused a meeting with LAPFF in Brazil and refused to speak with LAPFF about Samarco for around a year and a half.
- 1.13. Discussions with BHP have recently resumed in relation to Samarco, with the company promising that its litigation costs will not be as high as projected for various reasons.
- 1.14. However, based on one piece of Brazilian litigation and one piece of UK litigation alone, as well as reparation costs to date, it appears that BHP could be liable for reparation payments in the vicinity of 60 percent of the company's market capitalisation.
- 1.15. Therefore, LAPFF repeatedly uses BHP as an example of how failure to take accountability for and to respect human rights and the environment is heavily financially material for both companies and investors.

2. G&E class action

- 2.1. As funders of the group action Grant & Eisenhofer (G&E) and Kessler Topaz Meltzer & Check (KTMC), having instructed Australian law firm (Phi Finney McDonald), are pursuing a worldwide recovery action in Australia against BHP to recover investor losses. A Statement of Claim was filed against BHP in Australia on 31 May 2018 (Impiombato v. BHP Billiton Ltd. (VID649/2018)) and an amended complaint on 16 August 2019, (Impiombato v. BHP Group Limited).
- 2.2. This class action may be joined by any shareholder that acquired an interest in BHP Ltd shares listed on the Australian, London or Johannesburg stock exchanges between 8 August 2012 and 9 November 2015. It seeks damages for losses suffered up to 30 November 2015. Their group of investors now includes hundreds of institutional investors with total damages well in excess of \$1.5 billion.
- 2.3. This case is currently proceeding as an open class as a result of court orders dated 3 August 2018 and 18 December 2018. While the class currently remains open, it may be closed again by way of a "class closure order" before the resolution of the case (e.g., prior to court ordered

mediation). In recent years, such case closures have become the practice in Australia. G&E therefore strongly recommend that investors elect to participate in the case well before the class is closed.

- 2.4. Once the court issues a class closure order, the time to register may be quite short in light of internal approvals, especially for large institutional investors, like ourselves.
- 2.5. On 12 October 2022 the High Court of Australia (Australia's highest court) unanimously affirmed the two lower courts in dismissing BHP's appeal and confirmed that class actions can be brought in Australia on behalf of non-Australian class members. This is a win for claimants in this case, and for the landscape of class actions in Australia more generally. It also means that the opportunity to join the case is time-sensitive, as there is an increased risk that the class soon may be closed by the trial court.
- 2.6. The G&E case was one of several claims being brought. On 28 May 2019 the Full Court of the Federal Court of Australia dismissed one of the appeals and invited the two remaining groups to join the G&E action. On 19 July 2019 the Full Court made the appointment of the G&E group as co-lead counsel and shortly thereafter, they filed their Amended Statement of Claim.
- 2.7. On 28 July 2020 the Court ordered BHP to produce documents. The lawyers have received approximately 90,000 documents to date, which are being reviewed.
- 2.8. Under the Australian Securities Exchange (ASX) rules the timely disclosure of market sensitive information is essential to maintaining and increasing the confidence of investors. There is substantial evidence that BHP had information about the significant risks of dam failure, including information about construction defects during the dam's initial construction in 2008 and 2009.
- 2.9. Later reports provided additional information about the defects and problems with the dam and, at various times during 2013 (and later), employees reported cracks and water seeping through the dam wall.
- 2.10. Thus, it appears that BHP violated its continuous disclosure obligations because it failed to notify the ASX that: (i) there was at least a significant risk that the dam would fail; (ii) if the dam failed, the likely impact on health, safety, environment and community would be catastrophic; (iii) if the dam failed, it also would likely halt Samarco's iron ore production for a substantial period of time; and (iv) as a consequence, from that time there was a material financial risk to BHP, as part-owner of Samarco.
- 2.11. Australia has a well-developed system for shareholder class (or "representative") actions. In fact, outside of the United States, Australia is the number one location where a corporation is likely to find itself defending a class action.
- 2.12. Unlike the United States, Australia is a "loser pays" jurisdiction, which means that the unsuccessful party pays the costs of the prevailing party, and that the court is likely to require insurance and/or a bond to be in place, in case the litigation is unsuccessful. In support of such indemnity,

the funder has procured adverse costs order insurance through AmTrust Europe Limited.

- 2.13. G&E and KTMC have formed a joint venture, G&E KTMC Funding LLC, which offers a fully funded litigation option for BHP shareholders who wish to pursue a damages recovery, in exchange for a contingency fee. This is therefore a fully funded litigation option that sets the fee at 18% of the net recovery, after costs and expenses of the litigation. The funding fee will cover all costs for Australian counsel, other litigation, mediation, and settlement costs, and provide full indemnity, through adverse cost insurance or, if necessary, the posting of a bond for the eventuality of an adverse cost award under the Australian rules.
- 2.14. A significant number of LGPS funds have joined the case. In the past the Fund has successfully participated in a class action (notably against RBS). This was also led by G&E Law and recovered c£200k for the Fund.
- 2.15. Under no circumstances would Camden be asked to make any payments in connection with the case. The Fund would never be in a position of paying any amounts under any circumstances due to the adverse cost insurance secured for all litigants in this action, whether the case is won, lost or settled (this is confirmed in the retention agreements).
- 2.16. Recently it has been reported that BHP is close to settling with Brazilian authorities concerning this disaster, possibly before the end of the year. These reports also say that BHP want to settle all outstanding legal cases which would involve this case. This adds increased importance about deciding whether to join this class action.

3. RESPONSIBLE INVESTOR COMMENT

- 3.1. The Fund is a Responsible Investor and expects all fund managers and investments to act responsibly. The Fund has clearly articulated its investment beliefs and paragraph 1.5 sets out some of the beliefs that are directly impacted by this catastrophic event. LAPFF have engaged at length with mining companies over these issues and continue to progress work in this area.

4. ENVIRONMENTAL IMPLICATIONS

- 4.1. The impacts of this disaster have had devastating environmental impacts which are long lasting. LAPFF continue to engage on these issues to make sure reparations are made and BHP and others take responsibility for their actions.

5. FINANCE COMMENTS OF THE EXECUTIVE DIRECTOR CORPORATE SERVICES

- 5.1. G&E Law estimate that anticipated recovery will be 30-50% of losses. There is an 18% success fee deducted from the recovery after expenses. G&E Law represent c\$2bn of claimants in this case. The class action has bought adverse costs insurance provided by AmTrust Europe Limited and are also funding costs for local counsel, litigation, mediation and settlement costs at their own risk.

5.2. Based on G&E best estimates, and in consultation with their experts, they believe that Camden has recoverable losses of approximately £370k (after deductions for the contingency fee).

6. LEGAL COMMENTS OF THE BOROUGH SOLICITOR

6.1. G&E KTMC Funding LLC in conjunction with the litigant of the primary claimant Vince Impiombato have instructed Australian law firm Phi Finney McDonald in relation to the group action against BHP. The said law firm is assumed as the experts on the point of the claim's merits.

6.2. LGPS administering authorities have a fiduciary duty to act in the best interests of scheme members and achieving the best financial position for the fund.

6.3. There are risks inherent in any litigation however the legal advice would be that the risks have been mitigated by the adverse costs insurance and the funders' indemnity undertaking on costs.

6.4. The council may join the group litigation if the issues of risks and merits have been considered and the decision reached that it is in within the Pension Fund's better interest to join the group litigation as an added claimant.